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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

EX PARTE EDWARD WILLIAMS,
Petitioner,

vs.

JOHN J. GOLDEN, Marshal of the City of St. Louis.

No. 303.

RESPONDENT'S BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

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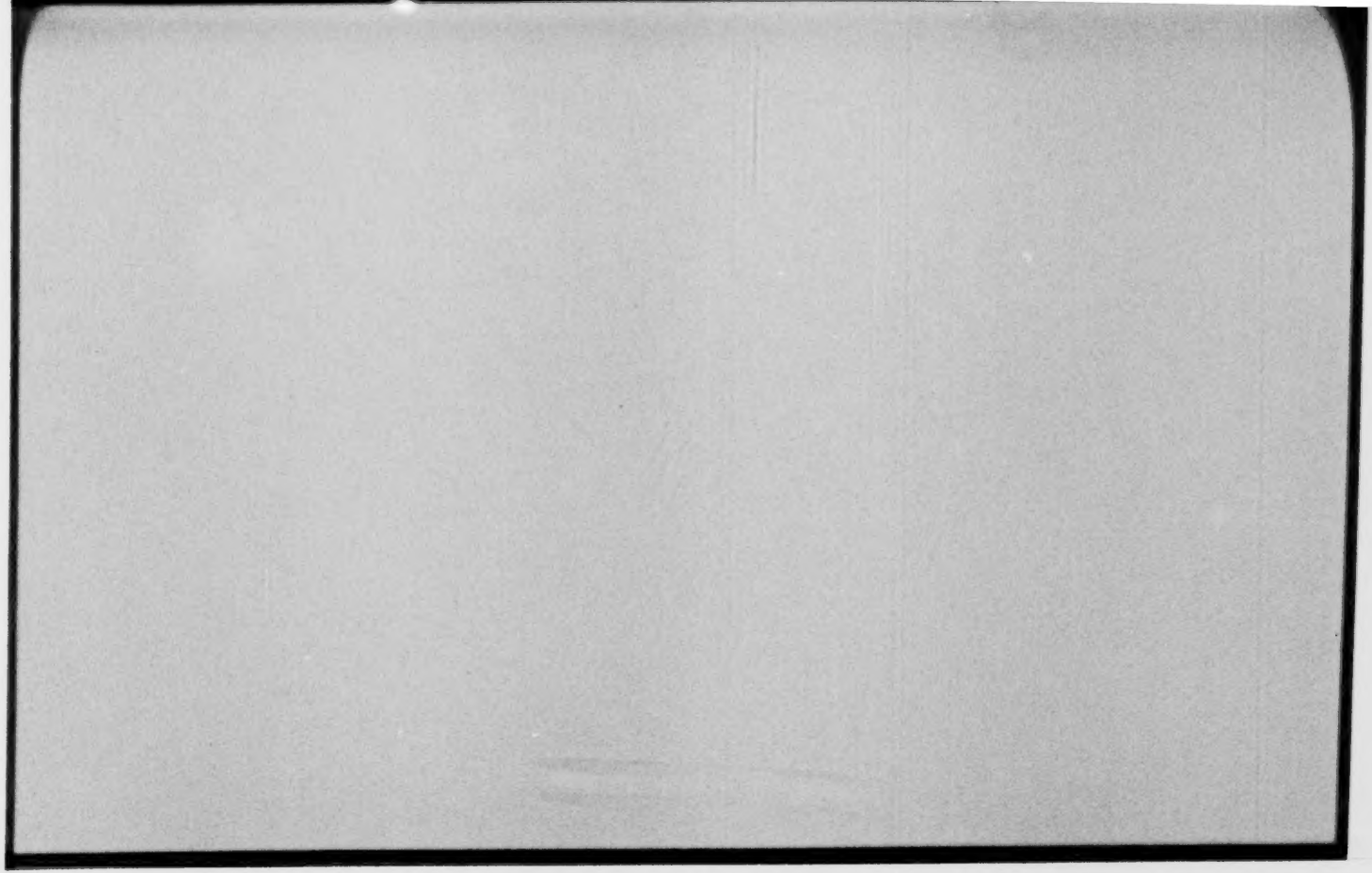

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I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is reported in *Ex Parte Williams*, 139 S. W. (2) 485, and is also found at pages 16 to 25 in the transcript herein.

The case has not yet been published in the official state reports.

II.

JURISDICTION.

It is admitted that the judgment sought to be reviewed was rendered by Division No. 2 of the Supreme Court of Missouri on February 21, 1940, and that a motion for rehearing was duly filed and was overruled by said Court on the 4th day of May, 1940.

The Supreme Court of Missouri is the highest court of the state. Article VI of the State Constitution, as amended in 1890, R. S. Mo. 1929, page 120, creates two divisions of the Supreme Court of Missouri, and by section 4 provides that, when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court for its decision. A constitutional question was decided by Division No. 2 of the Supreme Court of Missouri, but the petitioner failed to exhaust the jurisdiction of that court, in that he did not file a motion to transfer the cause to the Court en banc.

It is admitted that the federal statutes cited in paragraph 5 of the second subdivision of plaintiff's brief (under the caption "Jurisdiction") governs the issuance of writs of error to state courts.

III.

STATEMENT OF THE CASE.

The statements of fact set out in the petition for certiorari (p. 4) under the caption "Summary Statement of Matter Involved" are accepted as correct without admitting the conclusions of law predicated thereon by the petitioner.

ARGUMENT.

I.

This case was decided by Division No. 2 of the Supreme Court of Missouri (*Ex Parte Williams*, 139 S. W. [2] 485). No motion to transfer to the Court en banc was ever filed.

Article VI of the State Constitution, as amended in 1890, R. S. Mo. 1929, page 120, creates two divisions of the Supreme Court of Missouri and by section 4, in part, provides:

> "* * * or when a Federal question is involved, the cause, on the application of the losing party, shall be transferred to the Court for its decision * * *."

Under the Missouri practice, the motion for rehearing in the Supreme Court does not perform the office of a motion to transfer to the Court en banc. Rule 21 provides that motions for rehearing shall be filed within ten days after the opinion of the Court shall be delivered. Motions to transfer to the Court en banc are governed by Rule 24, which provides that they shall be filed within ten days after the disposition of the cause by the division (Rules of the Supreme Court of Missouri, Appendix to Missouri Reports 344).

Certiorari to review the decisions of a state court is not a writ of right, but is discretionary (*Philadelphia and Reading Coal & Ice Co. v. John Gilbert*, 245 U. S. 162, 62 L. Ed. 221). The issuance of the writ where the petitioner has failed to avail himself of every reasonable avenue of redress in the state courts not only casts an undue burden upon this Court, but requires the respondent to litigate here what might have been determined in the petitioner's favor in the state courts.

II.

In support of the contention that the ordinance for the violation of which he was arrested is invalid, the petitioner cites:

Lovell v. City of Griffin, 303 U. S. 444, 58 S. C. 666, 82 L. Ed. 949;
Schneider v. State of New Jersey, Town of Irvington, 308 U. S. 147, 84 L. Ed. 115;
Cantwell v. State of Conn., 60 Sup. Ct. 900.

In *Lovell v. City of Griffin, supra*, the ordinance prohibited the practice of distributing literature of every kind without a permit from the City Manager. The facts, as they appear in the opinion, are that the appellant was distributing religious tracts, and it was ruled that the ordinance was void on its face, the basis of this conclusion being that it violated the provisions of the Federal Constitution in respect to the freedom of the press and religious liberty.

In *Schneider v. State of New Jersey, supra*, this Court, by the consolidation of four cases, had before it ordinances of Milwaukee, Los Angeles, Worcester, Massachusetts, and Irvington, New Jersey. The Los Angeles, Milwaukee and Worcester ordinances do not purport to license, but they prohibit the distribution of handbills, circulars and like matter on the streets, and, one of them, in public places as well (308 U. S., l. c. 162), while the Irvington ordinance affects those who desire to impart information to citizens at their homes (308 U. S., l. c. 163).

In *Cantwell v. State of Connecticut, supra*, the appellants (so far as we are concerned) violated a statute requiring a permit from the Secretary of Public Welfare to solicit anything of value for an alleged religious, charitable or philanthropic cause, and authorizing the Secretary to determine whether such cause is a religious one or a

bona fide object of charity or philanthropy, and conforms to reasonable standards of efficiency. The appellants in that case sold pamphlets on religious subjects or asked contributions to defer the cost of their publication. It was held (l. c. 903) that the statute, *as construed and applied to appellants*, violated the Fourteenth Amendment as a denial of the free exercise of religious liberty.

The ordinances in all of the foregoing cases, except *Cantwell v. State of Connecticut*, are designed to prevent the distribution of literature and were condemned because they violated the constitutional provisions in respect to the freedom of the press and religious liberty.

The Connecticut statute involved in the last-mentioned case was somewhat similar to the St. Louis ordinance, but the appellants were convicted of violating those of its provisions which prevented the free exercise of religious liberty and interfered with the freedom of the press. The ordinance for the violation of which the petition here was arrested (Trans. p. 10) makes it unlawful to solicit money, property or financial assistance or to sell certain enumerated articles on the plea or representation that such sale or solicitation, or the proceeds thereof, is for either of four separate and distinct purposes, that is, charitable, religious, patriotic or philanthropic, purposes without a permit from the charitable solicitations commission established by the ordinance, which also requires the applicant for a permit to submit specified information concerning himself and the beneficiaries of his solicitation, provides for a hearing before the application for a permit is denied, and contains a saving clause (Trans. p. 14) reciting that if for any reason any section or part of a section shall be declared unconstitutional or beyond the power of the Board of Aldermen of the City of St. Louis to enact, such fact shall not affect or impair any of its other provisions.

The information upon which he is awaiting trial charges that the petitioner's solicitation was on the plea or repre-

sentation that the proceeds thereof were for a *charitable, patriotic and philanthropic purpose.* Obviously, the manner in which it is charged that the petitioner violated the ordinance has no connection either with his religious liberty or with the freedom of the press. Assuming that the constitutional provision relating to freedom of the press and religious liberty bars the enforcement of other parts of the ordinance that does not invalidate the part which was violated by the petitioner.

In *Jaehne v. People of New York,* 128 U. S. 189, 32 L. Ed. 398, it was contended that an act was invalid in that it undertook to make punishable acts committed before its enactment as well as those committed thereafter. This Court there stated what appears to be the rule applicable here, saying:

> "A legislative Act may be entirely valid as to some classes of cases and clearly void as to others. A general law for the punishment of offenses, which should endeavor to reach by its retroactive operation acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control."

The decisions relied on by the petitioner do not support his contention that solicitations for charitable, patriotic or philanthropic purposes are not within the legislative control of the state.

The respondent respectfully submits that the petitioner's application for certiorari should be denied.

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